United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

To Be Argued By:
STEVEN J. HYMAN

76-6185

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-6185

FREDERICK W. SILVERMAN,

Plaintiff-Appellant,

-against-

J. WILLIAM MIDDENDORF, II, SECRETARY OF THE NAVY, and COMMANDING OFFICER, BUREAU OF MEDICINE AND SURGERY, UNITED STATES NAVY,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF ON APPEAL

KUNSTLER & HYMAN
Attorneys for Plaintiff-
Appellant
370 Lexington Avenue
New York, N.Y. 10017

Table of Cases

Other Authorities:

TABLE OF CONTENTS

ISSUES PRESENTED

Whether the United States Navy may order a Reserve physician to active duty pursuant to Title 10 U.S.C. §454 when that Reserve physician is over the age of 35 and does not, at the time the orders were issued, consent to the change in status from reserve to active duty.

STATUTES INVOLVED

Title 50, U.S.C. App. §454

* * * *

(l) Order to active duty of reserve components in medical, dental, or allied specialist categories; period; age limit; computation of period; opportunity to resign commission; volunteer service

(1) The President may order to active duty (other than for training), as defined in section 101(22) of title 10, United States Code [section 101(22) of Title 10], for a period of not more than twenty-four consecutive months, with or without his consent, any member of a reserve component of the Armed Forces of the United States who is in a medical, dental, or allied specialist category, who has not attained the thirty-fifth anniversary of the date of his birth, and has not performed at least one year of active duty (other than for training). This subsection does not affect or limit the authority to order members of the reserve components to active duty contained in section 672 of title 10, United States Code [section 672 of Title 10].

* * * *

(4) Any physician or dentist who meets the qualifications for a Reserve commission in the respective military department shall, so long as there is a need for the services of such a physician or dentist, be afforded an opportunity to volunteer for a period of active duty (other than for training) of not less than twenty-four months. Any physician or dentist who so volunteers his service, and meets the qualifications for a Reserve commission shall be ordered to active duty (other than for training) for not less than twenty-four months, notwithstanding the grade or rank to which such physician or dentist is entitled.

EXECUTIVE ORDERS

Executive Order No. 10762

DELEGATION OF AUTHORITY TO SECRETARY OF DEFENSE

1. There is hereby delegated to the Secretary of Defense:

(a) The authority vested in the President by section 4(1)(1) of the Universal Military Training and Service Act, as added by section 2 of the Act of June 27, 1957 (P.L. 85-62; 71 Stat. 206)(section 454(1)(1) of this Appendix), to order to active duty (other than for training) for a period of not more than 24 consecutive months, with or without his consent, any member of a reserve component of the armed forces of the United States who is in a medical, dental, or allied specialist category, who has not attained the thirty-fifth anniversary of the date of his birth, and who has not performed at least one year of active duty(other than for training).

* * * *

REGULATIONS INVOLVED

Department of Defense Instruction 1205.1 - Implementation of the Universal Military Training and Service Act With Respect to Medical and Dental Registrants

* * * *

X. ORDERING COMMISSIONED PERSONNEL TO ACTIVE DUTY

A. Any physician or dentist who is a member of a reserve component of one of the Armed Forces, who has not attained his 35th birthday, and who has not performed at least one year of active duty (other than for training), exclusive of periods spent in student programs prior to receipt of the appropriate professional degree or in intern training, may be ordered with or without his consent to active duty (other than for training) as an individual for a period of not more than 24 months pursuant to subsection 4(1), Universal Military Training and Service Act, as amended.

* * * *

E. Any physician or dentist who meets the qualifications for a reserve commission in the respective military departments shall, so long as there is a need for his services, be afforded an opportunity, pursuant to subsection 4(1)(4), Universal Military Training and Service Act, as amended, to volunteer for a period of active duty for not less than 24 months.

Statement of the Case

Plaintiff appeals from the opinion of the Hon. Dudley Bonsal, Judge of the United States District Court for the Southern District of New York, rendered on the 8th day of November 1976, denying plaintiff's motion for preliminary injunctive relief and granting defendants' motion to dismiss the complaint, and the entry of judgment in favor of defendants and against plaintiff (A.3-10). */

Plaintiff filed his complaint in the United States District Court for the Southern District of New York on June 21, 1976, seeking, inter alia, declaratory, injunctive and mandamus relief. Specifically, plaintiff challenged the authority of the United States Navy to order him to active duty as a Reservist on the grounds that he is now over thirty-five years of age and that such order to active duty is violative of applicable statute and regulation. The matter was argued before Judge Bonsal on July 11, 1976, and decision was rendered on November 8, 1976.

Plaintiff has duly filed notice of appeal from such decision and judgment and comes before this Court pursuant to the scheduling order for expedited appeal entered on the 1st day of December, 1976.

---

*/ All page references are to the Joint Appendix.

STATEMENT OF FACTS

The issue presented by this appeal is whether the United States Navy has been empowered by regulation and statute to call appellant to active duty and thereby transfer him from reserve to active duty status. Inasmuch as the issues involve statutory construction and interpretation of regulation, there is little factual dispute between the parties. */

Appellant is a physician who was born on March 18, 1940. At the time he was called to active duty he was over the age of 36.

In November, 1969, when appellant was 29 years of age and vulnerable to the draft, he enlisted in a program known as the "Berry Plan". At that time he was appointed an officer in the United States Naval Reserve (A.30-33). Until his call to active duty, appellant was continued in the Inactive Reserve.

During the period from November 1969 to June 1974, appellant was deferred from call to active duty in order to complete his residency in general surgery (A. 34-42). At the completion of appellant's residency he was under the age of 35 and eligible for call to active duty under the Berry Plan. Nevertheless, at such time his services were not, apparently, needed (A. 48-52) and he was given further deferment through June 1976, during which time he completed a fellowship in surgical

*/ The outline of the facts is essentially as contained in Judge Bonsal's opinion and the Court is respectfully referred to it (A. 4-6).

oncology at the Sloan-Kettering Memorial Hospital in New York City.

On April 6, 1976, appellant advised the Navy that he did not consent to call up to active duty on the grounds that, inter alia, he was over the age of 35 and therefore ineligible (A. 21). On June 11, 1976, appellant was advised that he remained legally obligated to serve on active duty and that he was to report as ordered (A. 23), the date having been previously set as July 7, 1976.

Appellant, facing imminent call to active duty, commenced this action on June 21, 1976, by order to show cause, seeking temporary and preliminary injunctive relief (A. 11-23). Appellant's call to active duty was thereafter stayed pending determination by the District Court of the issues raised herein. Following the decision herein, appellant was ordered to active duty.

POINT I

THIS COURT HAS JURISDICTION TO REVIEW THE LEGALITY OF APPELLANT'S CALL TO ACTIVE DUTY FROM THE UNITED STATES NAVAL RESERVES

The issue raised by this appeal involves solely questions of power and authority of the United States Navy to change appellant's status from a reserve status to an active duty status. Appellant contends that pursuant to governing statute, executive order and applicable Department of Defense Regulation and Instruction, the United States Navy is without such power and authority to order appellant to active duty after he has attained the age of 35. No question of executive discretion or military expertise is involved. Under such circumstances this Court has full jurisdiction to review the issues raised.

While the District Court intimates in its opinion that appellant was improperly in court because he had failed to exhaust his administrative remedies, such a position is without merit and contrary to the law of this circuit. It has long been noted by this Court that where there is a claim that the military has failed to adhere to its own regulation or has exceeded statutory authority, this Court has full jurisdiction to review the merits. See Smith v. Resor, 406 F. 2d 141 (2d Cir. 1969) and Hammond v. Lenfest, 398 F. 2d 705 (2d Cir. 1968). See, also, Hornstein v. Laird, 327 F. Supp. 993, 996 (S.D. N.Y. 1971). In Kurlan v. Callaway, 510 F.2d 274, 280 (2d Cir. 1974) the Court

stated it simply:

> "However, the military is not free to disregard its own regulations or federal statutes."
>
> (at p. 280)

Where mandamus is not an appropriate remedy because military discretion is involved, the standard of jurisdiction is, of course, different. Ornato v. Hoffman, ____F.2d _____ (decision rendered December 2, 1976 2d Cir. 1976). Further, where military expertise is needed and the matter involves internal military consideration, requirement that the case be referred to the Board of Correction of Military Records may be appropriate. See McGee v. Schlesinger, 378 F. Supp. 318 (W.D. Texas, 1974) citing Mindes v. Seaman, 453 F.2d 197, 201 (5th Cir. 1971). See, also, Sherman, Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement, 55 Va. L. Rev. 483 (1969).

Neither this Court nor any other circuit has ever required that a serviceman must go to the Board of Correction of Military Records before seeking judicial relief where the claim involves questions of authority and adherence to statute or regulation. See Mindes v. Seaman, supra, at p. 200. In the case at bar the District Court has thus misconstrued the existing case law and confused the jurisdictional requirements applicable

where military discretion and expertise is involved with requirement of adherence by the military to statute and regulation.

Appellant has exhausted the reasonable remedies available to him in the military. He filed his request that he not be called to active duty which was considered by all military personnel authorized to act on the matter and he was nevertheless thereafter ordered to active duty. Appellant contends that such call to active duty is contrary to statute and regulation and sought preliminary relief in the appropriate forum. If, as appellant contends, his call to active duty did exceed statutory and regulatory authority, then appellant is properly before this Court to seek judicial review. Smith v. Resor, supra; Kurlan v. Callaway, supra; Ornato v. Hoffman, supra. Such claims cannot and should not be required to await a determination by a Board not equipped or intended to deal with them. Appellant is appropriately before this Court. See Morse v. Boswell, 289 F. Supp. 812 (D.M.D. 1968) aff'd 401 F.2d 544, (4th Cir. 1968) and Goldstein v. Clifford, 290 F. Supp. 275 (D.N.J. 1968). See, also, Winters v. United States, 281 F. Supp. 289 (E.D. N.Y. 1968) aff'd 390 F.2d 879 (2d Cir. 1968). In Winters the Court acknowledged jurisdiction to review a call up to active duty to the extent of determining whether the military had acted within its jurisdiction under valid law. Appellant seeks the same relief in this Court, today.

POINT II

THE UNITED STATES NAVY IS WITHOUT AUTHORITY TO CALL APPELLANT FROM A RESERVE STATUS TO AN ACTIVE DUTY STATUS

It has long been recognized that in order to call an individual from a reserve status on to an active duty status it must be done pursuant to authority given to the President by the Congress and thereafter delegated to the appropriate subordinate involved. See Morse v. Boswell and Winters v. United States, both supra. Thus Congress has enacted legislation which provides for call to active duty of a reservist during time of war [10 U.S.C. §672] or national emergency [10 U.S.C. 673] or unsatisfactory participation [10 U.S.C. §673(a)]. If the President has not been authorized by statute to call the reservist to active duty, then such call to active duty would be illegal and contrary to law.

It is appellant's contention, as will be discussed below, that notwithstanding his enlistment in the Berry Plan and his appointment as an officer, Congress has not delegated to the President the authority to order appellant from his reserve status to an active duty status once he has attained the age of 35. Except for time of war, emergency or unsatisfactory

participation, appellant's call to active duty almost seven years after he became a member of the United States Naval Reserve is governed solely by Title 50 U.S.C. App. §454 (1)(1). This section by its very terms is limited to a call to active duty of a reservist, "with or without his consent" only when such reservist-physician is under the age of 35.

Although the District Court sustained appellant's call to active duty as being authorized under 50 U.S.C. App. 454(1)(4), this section does not cover appellant and was not intended by Congress to authorize the call to active duty of Berry Plan reservists. It is the distinction between these two sections that is the gravamen of the appeal before this Court. The distinction between 454 (1)(1) and 454 (1)(4) is substantial both on its face and when viewed in the context of the legislative history and the purposes of enactment of the sections. Section 454(1)(1) covers physicians who are members of the Reserve and who have not served at least one year on active duty. The plain meaning of the statute is applicable to appellant's situation since he has not served on active duty for one year previously, and prior to his call to active duty was, for seven years, a member of the Reserves. But for the age limit, appellant could have no grounds to challenge jurisdiction under this section. See Appelwick v. Hoffman, 540 F.2d 404 (8th Cir.1976).

In Appelwick the court noted the underpinnings of the Berry Plan in which appellant enrolled. The court traced the delegation

of authority for the call up of physicians who were members of the program. The court noted that general authority for the President to call up to active duty such medical specialists was vested in 50 U.S.C. App. 454(1)(1); that the President thereafter delegated his authority to the Secretary of Defense pursuant to Executive Order 10762 (see Brief, p. iii). and that this authority was thereafter delegated to the Secretaries of the three military departments. The court further noted that the Department of Defense outlined at the very least, procedural, if not substantive limits in the Department of Defense Instruction 1205.1. (See Appelwick, supra, at p.407, fn.5). Critical to the issue before this Court is that the Eighth Circuit recognized, as appellant argues, that the very underpinnings for the call up of a Berry Plan Reserve physician resides solely in 454 (1)(1).

On the other hand, 454(1)(4) does not, by its plain meaning, cover appellant at the time the orders to active duty were issued. Section 454(1)(4) applies only to civilian physicians who "qualify" for commission, as obviously compared to those who have already qualified and have become members of the Reserves. Secondly, it uses the term "volunteer" which is not applicable to appellant's situation as of the issuance of the call to active duty. (See A.21)

The legislative history supports appellant's contention that §454(1)(ı) is the appropriate section under which Berry Plan physicians who have enrolled in the Reserves are to be called to active duty. In considering the context of the legislation, it is important to note that the Berry Plan was exclusively intended to be an alternative for draft-eligible physicians. See 32 C.F.R. §58.1(1) and Department of Defense Instruction 1120.2IB. Under the doctor-draft the age of vulnerability was cut from 51 to 46 and thereafter to 35. See Title 50 U.S.C. §454(ı) and (j) [now repealed] and legislative history 1957 U.S. Code Cong. & Adm. News, p.1255. The history of §454(1)(ı) reflects the same revision in age eligibility (Id.).

Yet the legislative history of §454 (1)(4) clearly indicates that it was intended by the Congress that the section apply to those individuals who were <u>not</u> eligible for the draft at the time they volunteered. In fact a review of the legislative history contained in the House Report of the Committee on Armed Services, 85 Cong. 1st. Sess., House Report No. 394, reveals that the Department of Defense objected to this provision for just such a reason. */

*/ At the time the Berry Plan was being implemented in 1953, the Department of Defense also opposed the predecessor of 454(1)(4), thereby clearly indicating that it did not consider Berry Plan physicians to come within the ambit of this particular subsection. See Hearings of the Armed Services Committee of the U.S. Senate, 83 Cong.,1st Sess., May 18, 1953, at p. 18.

The Committee Report, in arguing for retention of 454 (1)(4), stated as follows:

> "This provision [454(1)(4)] is now contained in existing law which will expire on July 1, 1957. Since this legislation is discriminatory in that it singles out physicians and dentists and allied specialists for special calls over the age of 26, there appears to be no reason why the Armed Services should not be required to accept the volunteer services of physicians and dentists and allied specialists who are not subject to the provisions of the proposed legislation [doctors draft] if by accepting their services it will reduce the necessity for involuntary call of another physician, dentist or allied specialist who is otherwise liable within the terms of the proposed legislation."
>
> (House Report of the Committee on Armed Services, 85th Cong., 1st Sess., House Report No. 394,p.8)
>
> [emphasis added]

In fact, a review of the entire legislative history covering this section demonstrates that Congress intended 454(1)(4) to cover civilians volunteering to enter upon active duty when they were beyond the reach of such programs as the Berry Plan and when they were not being called up to active duty from a reserve status. The legislative history of 454(1)(1), on the other hand, makes it clear that it, as Appelwick notes, is the fountainhead for the Berry Plan. This section was, in fact, enacted to cover the physician who signed up for a Reserve commission, agreeing to serve on active duty at some future date while eligible for the draft. It is in fact a precise description of the Berry Plan and how it is implemented.

A review of the pertinent legislative history of 454(1)(i) substantiates that this section was the sole authority given the President to call to active duty physicians enrolled as Reservists in the Berry Plan, except in time of war or national emergency. Congress regarded 454(1)(i) as the enabling statute for the President to call to active duty a Reservist-physician where, for whatever reason, the physician has withdrawn his consent to enter upon active duty. Congress understood that the change in status from reserve to active duty must be enforceable by more than the mere future consent of the individual concerned. In 1953, when 454 (1)(i) was first being considered, the need for the legislation was succinctly pointed out by the general counsel to the Armed Services Committee of the House of Representatives. He stated:

> "A doctor will apply for a reserve commission. There is no authority to involuntarily order him to active duty. So you say, 'you better apply for a commission or we will induct you.' Now the authority to induct is there. So he applies for a reserve commission. It is an indefinite commission. The orders are written. They are sent him. Then he writes a letter to the Department, which is his right, and says, 'please cancel my orders to active duty at this time.' What can you do about it? Nothing."
>
> (Statement of General Counsel Blandford to the House Armed Services Committee, May 12, 1953; 83rd Cong. 1st Sess. pp. 552-3).

In 1957, when 454(1)(i) was being considered for re-enactment, Congress recognized the necessity for the continuation of the

legislation to enable the President to call a Reserve physician to active duty, noting it to be one of the "two main features of the bill" (1957, U.S. Code Cong. & Adm. News, p. 1257). The House Armed Services Committee Report stated it thus:

> "Since there is no provision of law under which individuals who apply for and who are granted commissions under the provisions of the proposed legislation may be involuntarily ordered to active duty, the Committee on Armed Services has amended the proposed legislation so that the President will have the authority to involuntarily order to active duty individuals in these categories who obtain reserve commissions thus avoiding any legal complications that may otherwise arise without this specific authority. The amendment will only apply to individuals under the age of 35 ...."
>
> (House Armed Services Committee Report No. 394, 85th Cong. 1st Sess., p. 7)

The Senate Report, in reviewing the need for §454(1)(i) stated the issue in similar terms:

> "This paragraph [454(1)(i)] in effect provides Presidential authority for their [Reserve physicians] involuntary call to active service after they have been awarded their Reserve commissions. Without this language there would be no specific Presidential authority for a call of commissioned officers and the military service would have to rely solely on the moral commitment of the men to voluntarily enter active service after they have been given a commission."
>
> (Legislative History, 1957 U.S. Code Cong. & Adm. News, pp.1257,58)

The Report further stated:

> "This provision is necessary since there would otherwise be no specific authority to involuntarily call to active duty medical or dental officers who accepted a commission in lieu of induction."
>
> (Id., at p. 1259)

It would thus appear clear that Congress understood the necessity for the legislation to give the President the necessary power to call individuals such as appellant on to active duty. Yet Congress did not intend that the President's authority be unfettered and it limited the right to call individuals like appellant to active duty if they were under the age of 35, except in time of war or national emergency. The 35-year age limit was not accidental. The original doctors' draft law enacted in 1950 (see 50 U.S.C. App. 454(i) and (j) [repealed]) set an age limit for the draft of 51, but no age limit on the call-up of physicians from the Reserve. (See 1950 U.S. Code Cong. & Adm. News, p. 885 f.f.) Thereafter, in 1955, the doctors' draft law was limited to individuals up to the age of 46, and in 1957 reduced to the present age limit of 35. However, it was only in 1957 that Congress added the 35-year limitation to the call to active duty of physician-Reservists and at that time the Berry Plan was in full force and effect and the terms and provisions known to the Congress of the United States.

In view of the above discussion appellant submits that the District Court's analysis of the applicable sections of the law that govern his situation was erroneous. Appellant is a physician in the United States Naval Reserves being called to active duty pursuant to the authority given the President by the Congress of the United States under §454(1)(i) and by its very

terms that section does not authorize the call to active duty of an individual over the age of 35. While appellant may have given his consent in 1969 to be called to active duty, as a result of lapse of time and change of circumstances he does not do so, today. He remained eligible for call-up as provided by statute and the Berry Plan for almost seven years and the Navy chose not to call him to active duty until he had passed his 35th birthday. This it may not do. Congress has provided the President with the power it felt necessary and justified, but that power does not include authority to bring appellant to active duty when he is 36 years old.

Conclusion

The United States Navy may not require appellant to enter upon active duty for two years as a physician when orders for active duty were issued after appellant had attained the age of 35.

Respectfully submitted,

KUNSTLER & HYMAN
Attorneys for Plaintiff-
Appellant
370 Lexington Avenue
New York, New York 10017

Of Counsel:

Steven J. Hyman